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ABSTRACT

This study analyzes court records of a county-level trial in Austin, Texas, in which erotized AIDS-HIV safer-sex information shown on a public access cable television program was claimed by the State of Texas to be obscene. This trial raised questions regarding such issues as: free access to information, especially through new technological devices advanced by the information superhighway concept; the need for life-saving health information; and the impact of culture and social norms on how people are allowed to receive and encouraged to process information. The nature of the sexual value controversy in American society is outlined, and it is explained how erotic materials, although defended and used by many as a legitimate form of safer-sex information, often conflict with broad-based sexual and community values. The study considers how the provision of erotized, HIV-AIDS information products can be a form of radical political actions designed to force societal change. Legal literature related to First Amendment issues is examined; and legal reviews are used to highlight major issues which emerged during the trial and appeal process, and which seem important to broadly defined First Amendment rights and the dissemination of HIV-AIDS and safer-sex information through libraries, information centers, and emerging electronic information systems. Court record analysis includes statements from the defendants, opening final arguments for the state and the defendants, closing final arguments of the state, and the appeal of the convictions. (Contains 41 references.) (MAS)

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EROTIZED, AIDS-HIV INFORMATION IN COURT: A STUDY IN STATE CENSORSHIP, CULTURAL RESISTANCE, AND FIRST AMENDMENT ISSUES AFFECTING INFORMATION DELIVERY IN INFORMATION CENTERS

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ABSTRACT

EROTIZED, AIDS-HIV INFORMATION IN COURT:
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This study analyzes court records of a county-level trial in Austin, Texas in which erotized AIDS-HIV safer-sex information shown on a public access cable television program was claimed by the state of Texas to be obscene. Outlines the nature of sexual value controversy in American society and explains how erotic materials, although defended and used by many as a legitimate form of safer-sex information, often conflict with broad-based sexual and community values. Considers how the providing of erotized, HIV-AIDS information products can be a form of radical political actions designed to force societal change. Replying on legal literature as related to First Amendment issues, the study uses legal reviews to highlight major issues which emerged during the trial and appeal process and which seem important to broadly defined First Amendment rights and the dissemination of HIV-AIDS and safer-sex information through libraries, information centers, and emerging electronic information systems.

EROTIZED, AIDS-HIV INFORMATION IN COURT: A STUDY IN STATE CENSORSHIP, CULTURAL RESISTANCE, AND FIRST AMENDMENT ISSUES AFFECTING INFORMATION DELIVERY IN INFORMATION CENTERS

Objectives of the Study

Researcher Mary-Claire van Leunen (1979) has written that "the records of court cases are a rich source in social history ... [and] situation ethics" (p. 214). The present study is a analysis of an Austin, Texas criminal trial involving the use of homoerotic HIV-AIDS information telecast on local cable access television allegedly as a means to help in controlling the spread of the HIV virus in the local community. As such, this study is an attempt not only to underscore the validity of van Leunen's statement, but to show through a case study approach to court records and other public accounts the impact that AIDS is beginning to have on social structures and information dissemination frameworks in modern-day society.

The August, 1994 trial of Terrel Johnson and Gareth Rees raises questions regarding such issues as: free access to information, especially through new technological devices advanced by the "information superhighway concept;" the need for life-saving health information; and the impact of culture and social norms on how people are allowed to receive and encouraged to process information.

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Specifically this study will attempt to outline theoretical reasons supporting erotized, safer-sex information; and it will seek to discuss social and political conflicts in terms of how sexual values are accepted and/or rejected within American society. Drawing upon documented evidence for the actual Johnson and Rees trial and appeal briefs, the study will further seek to demonstrate how ideas about sexual conduct can be polarized in the public arena. In addition, the study will draw upon important legal opinions, interpretations, and criticisms to place the Johnson and Rees trial into a larger prospective of First Amendment rights and the free exchange of ideas and information.

Background for the Study

During the week of August 23, 1993 Johnson, producer of the community access channel program Infosex, and the programs's host Rees were arrested and charged with violation of the state's obscenities laws and with recklessly exposing minors to sexually explicit materials (Banta, 1993).

Their arrest arose because of a presentation which occurred on their televised, live-call-in sex information program concerning safer-sex methods directed especially at gay men. In this program Rees and Johnson had used a segment of a tape produced by the Gay Men's Health Crisis, Inc. (GMHC) of New York which included explicit sexual acts between nude men. At the end of their trial Johnson and Rees were found guilty by the jury of violating Texas' obscenity statutes, but acquitted on charges related to exposing

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minors to obscenity. The convictions are now on appeal with the Texas Third Court of Appeals.

Theoretical Considerations

Sexual Values in Conflict

Sociologist Steven Seidman (1992) writes that a basic debate is occurring within American society concerning sexual ideology and issues of how to determine boundaries of legitimate sexual intimacy within social life. Simply but dramatically, homosexuality raises questions regarding the degree of tolerance which American society will allow for sexual and social diversity. At the national level, a good example of this conflict is seen in the protests by Senator Jesse Helms regarding what he considers the institutionalization of homosexuality through public school instruction and other forms of public information dissemination ("Fighting AIDS," 1991, McFadden, 1992, and Naylor, 1994).

Defining Erotic Materials

Aside from materials and instructions which allegedly might present homosexuality in a positive way to school children, the HIV health disease and crisis has presented another problem to society and that is how to define and accept and/or reject the use of erotic materials as sources of health information. In general, courts have protected the rights of adults to acquire and hold materials which are indecent, pornographic, and even obscene. Laws, court decisions and precedent hold that in most cases adjudicated obscene materials are not protected by First Amendment

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rights and have no place in public forum. With the exception of child pornography, the Supreme Court has held that such material can be held by citizens in their homes. Aside from this, the question remains can erotized, homoerotic, HIV-AIDS health information produced for wide distribution be held obscene according to law?

Black's Law Dictionary (1990) gives this definition of obscene: "objectionable or offensive to accepted standards of decency" (p. 1076). Webster's Tenth Collegiate Dictionary (1993), further defines obscene as "disgusting to the senses; abhorrent to morality or virtue; designed to incite to lust or depravity" (p.803). According to current legal terms, obscene materials are judged on a tier of facts including community adult standards; its appeal to prurient interests, the description of sexual conduct in a patently offensive way, sexual conduct defined by applicable state law, and whether the work taken as a whole lacks serious literary, artistic, political or scientific value (Black's Law Dictionary, 1990, p. 1076). Whatever definitions are applied, erotic art, especially homoerotic art and narrations have been widely used and defended in HIV-AIDS information delivery, thus promoting controversy (Klusaček and Morrison, 1992).

Erotized Material as Health Information

Social critic, Cindy Patton (1992) has argued that because HIV-AIDS information demands an unequivocally conveying and reinforcing safer-sex information, its design must be looked at from cultural, anthropological, and linguistic prospective. Among

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other attributes, culture constitutes and validates the life and values of groups and subgroups within society. She therefore suggests that safer-sex information for subcultural groups must speak in vernacular terms that can be understood by members of the subgroup. She further argues that many cultural groups cannot be measured by the standards of white-middle class heterosexual norms because such norms do not anthropologically reflect minority sexual cultures. In addition, many within minority cultural groups often lack decoding skills and behavioral and social values of the mainstream society which would allow them to internalize and act upon safer-sex information presented in standard language. In the Johnson and Rees trail, defense witness Saul Gonzales, an attorney and founder of Informa SIDA, an Austin community-based AIDS service agency devoted to the information needs of Spanish-speaking populations, alluded to this principle when he said:

> Visual material is especially important to persons who did not read English, or do not read well.

Patton argues that sexual languages vary from culture to culture. Sexual language may be important in some culture, offensive in others, and unimportant to others. Sexual vernaculars are learned and practiced within social contexts which likewise promotes authority and creates a coherent language with a legitimate heritage. Assuming this reasoning is correct, then sex educators and sex information-designers are mandated to work within the logic of sexual, behavioral, linguistic, and value

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interpretations which are established and/or evolving within cultural communities.

According to Patton, the language of heterosexuality, because of its claim to orthodoxy and naturalness, is threatening to those who operate within the gay male and other minority sexual cultures and who converse in their vernaculars. It is therefore asserted that the use of pornography and erotized, safer-sex information produced in the vernacular of gay, and/or racial and drug minority cultures is more than justified because it not only coveys exact information that can be life-saving through explicit symbols, but also because it offers an enriched mediator within a complex vernacular" (Patton, 1992, pp. 192-203).

Harvard scholar Nelson (1994) likewise wrote that sexual behaviors are defined by communities and before safer-sex messages can be successful, ingrained definitions of sex must be challenged and reconstructed. For example, before safer-sex messages are effective in changing behaviors ideas of male prowess, machismo, and the role of the feminine in both males and females must be modified, and within the gay community, directed toward a celebration of gay male sexuality while at the same time providing gay males information on how to reduce sexually risky behaviors. Nelson states that the resurgence of conservatism in the United States makes the creation and presentation of such instructional messages not only difficult, but an act of radical cultural resistance.

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Application of Erotic Materials in HIV-AIDS Information

Based on these theoretical concepts, erotic materials have been designed for use with both heterosexual and homosexual audiences, but they have found special use with gay and bisexual men.

Author and sports critic Brian Proger (1990) writes that many gay men tend to structure much of their personal identity around their sexuality and their seeking of masculine symbols. The late gay-reporter Randy Shilts (1987) reminded us that significant sectors of urban-gay men in the 1970s had politicized and began to institutionalize this sexuality within their culture. Shilts wrote convincingly that early in the HIV-AIDS epidemic, many gay men and their leadership became defensive when some of their sexual behaviors came under suspicion as causing of the spread of HIV infection.

GMHC, the world's oldest and largest community-based AIDS organization, was founded in 1981 partially as a reaction to this political situation and directly as a result of the health threat which HIV and AIDS was beginning to present.

As a result of the difficulties which many gay and bisexual men in New York City were experiencing in adopting safer-sex techniques in the early to mid-1980s, GMHC developed workshops and produced training materials which were designed to help gay and bisexual men explore issues of sex and AIDS (Palacious-Jimenez and Shernoff, 1986). The workshops themselves centered around four therapeutic parts:

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1. **Mourning**: Allows participating to acknowledge and mourn the loss of old sexual behavior patterns and the loss of no longer being able to act on sexual impulses.

2. **Affirming**: Empowers participants with a sense of sexual possibility and adventures, degenitalizes sex while still encourages erotic playfulness.

3. **Eroticizing**: Teaches men how to eroticize safer- sex options, how to give up fear of erotic behaviors and feelings and teaches sex-positive attitudes.

4. **Negotiating**: Instructs men how to negotiate safer-sex agreements and how to set limits about sexual agreements.

Although all of the these elements are important in explaining GMHC's rationale for the use of erotic materials, understanding the workshop's section concerned with eroticization is paramount to the present discussion. According to the workshop designers, the eroticizing process allows participants to discuss how to better eroticize safer-sex options. The process also helps to free participants from the fear of having erotic feelings in the face of disease, and it further gives gay men permission to act on those feeling in terms of safer-sex behaviors.

The eroticizing section of the workshop consists of experiences which teaches gay and bisexual men such things as how to use a condom in safer ways and to allay performance anxieties while using a condom; how to discover specific ways of having satisfying safer-sex; how to share feelings when discovering the

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wide variety of sexual options still available; and how to have satisfying, but safer orgasms.

GMHC provides informational publications which embrace the psychological and therapeutic values believed to be found in the incorporation of eroticized information with sex-positive and gay-positive HIV-AIDS information. For example, among the information items produced is a series of comic strips promoting safer, but erotic sexual encounters between men. These strips have appeared in gay-orientated magazines and are available in comic book formats. Typically they feature realistic drawings of attractive and non-stereotypical gay and/or bisexual men engaging in detailed, but safer-sexual practices (Art in America, 1990).

In addition to print, GMHC has produced several safer-sex videotapes, one of which is Safer Sex Shorts, which contains "Midnight Snack," the offending tape in the Johnson and Rees trial. According to GMHC, this film of "shorts" was "designed to trigger discussions around sex in educational forums [and] ... are intended to be viewed in the context of a comprehensive training program dealing with safer sex practices" (Gay Men's Health Crisis, 1994, p. 6). The film shorts demonstrate in explicit ways how specific sexual acts can be made safer. In addition, the materials are produced to be culturally relevant and are meaningful to specific audiences (Carlomusto and Bordowitz, 1992). Following the lead and directions established by GMHC numerous groups, especially community-based AIDS service organizations, use and promote information products which incorporate erotic features.

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Differing Meanings of Sexual Morality

Within American culture today, scciologist Seidman writes (1992), there are basically two divisions concerning the meaning and morality of sex. One ideology, which he terms "libertarian" sees sex as joyful and self-fulfilling. Libertarians do not support a morality centered on the sex act itself. Essentially they hope to expand legitimate sexual expressions and to reduce the role of society and government in determining sexual behavior. The opposing ideology, called the "romantics" by Seidman see dangers in eros; and in reaction, they promote a romanticized version of sex. Sexual romanticism projects a moral hierarchy of desires, acts, and lifestyles and expects conformity to an intimate, loving, monogamous, private, and adult sexual life. These two ideologies divide American culture concerning not only homosexuality and HIV-AIDS but other issues such as teen sex, cohabitation, sex education, public sexual expression and a host of other ideas; and these ideologies and issues collided dramatically in the Johnson and Rees trial.

First Amendment Issues and the Local Community

Cultural Diversity and Censorship Attempts in Austin

Censorship attacks on HIV-AIDS information are only symptoms of the larger battle raging in American society today as implied in the criminal trial of Rees and Johnson. But why did this particular trial with this particular issue occur in conservative Texas?

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Although Austin is the capitol of Texas, many have said that it is not "of Texas"--meaning that it is far more liberal than the state as a whole (Barnes, 1994). Perhaps the growth of a visible gay and lesbian community is a sign of this liberalism. Not only is Austin's gay and lesbian population reported to be very visible, but it is politically active and vocal. Because of this visibility, critics of gays and lesbians have often disparagingly called Austin "the San Francisco of the South."[1]

Evidence of this liberalism might also be implied from statements made in the 1970s by some Austin public officials. For example, in 1974 Bob Binder, mayor of Austin at the time, voiced concern about police raids on X-rated bookstores and movie houses, stating his fear of censorship. He said in a prepared statement:

> I have watched with increasing dismay as certain local authorities continue their activities of attempting to silence certain book and film stores, restricting the rights of Austin citizens to have that robust and diverse availability of information that I feel is the spirit of the First Amendment....

He went on to say:

> ...Censorship is alien to our community. Apparently, what is illegal is whatever turns certain officials on. Such activities are having a chilling effect of free expression in Austin.

(Barry, 1974, p. 13).

Obscenity Law Enforcement in Austin

Later in 1979 then County attorney, Jim McMurtry lamented the fact that no jury in the city had been able to arrive at a community standard for Austin, resulting in hung juries in three obscenity cases which his office had presented for trial within a five-year period. He said:

> ... We don't have anybody who is your typical Austinite. And when you don't have people of similar backgrounds. It's difficult to determine a community standard... (Sutton, 1979, Sec. B, p. 1, p. 8).

This inability to obtain convictions on obscenity charges led him to write a letter to former police chief Frank Dyson "advising ... that until something changes--the law, society or distribution procedures--he would recommend no more [obscenity] arrest or trials." At that time McMurtry described Austin as liberal, yet with such population diversity that a community standard for Austin regarding obscenity was difficult, if not impossible to obtain (Sutton, 1979, Sec. B, p. 1).

But that all changed with the obscenity conviction of Johnson and Rees in 1994, some twenty years after the county's last obscenity conviction. What can explain the difference between how juries viewed this case and others from the past? In terms of the Johnson and Rees case, several characteristics should be noted. These included: a new, but only slightly modified obscenity law which took effect October, 1979; the country and Austin had become more conservative, the distribution system of the obscenity

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material was different in the Johnson and Rees case, and the Court's charge instructing the Johnson-Rees jury to go beyond Austin and Travis County and consider the whole state of Texas as its base for a definition of community standard was considerably different from community standards used in the 1970s. This instruction was apparently based on or influenced by a 1987 precedent set by the Appellate Court for the Second District of Illinois which allowed a statewide standard of community to be applied locally. (Stewart, 1988).

As noted, earlier Austin cases raised different access questions. Obscenity cases in the early 1970s were generally brought against owners, managers, and employees of adult bookstores and other outlets which sold explicit sexual materials to adults only. However, the InfoSex case presented questions of disseminating explicit sexual information over public access television and raised issues regarding the availability of adequate controls and safeguards designed to protect the sensibilities of viewers and perhaps exposing minor youth to possibly harmful obscenities.

Approach to Analysis

This case study attempts to follow a naturalistic line of inquiry and it is therefore based on an examination of official court records pertaining to the Johnson and Rees indictment and trial and their appeal of their conviction to the Third Texas Court of Appeal. To ensure objectivity, a form of the memo method of

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data collection was used by the investigator. This method helped identify and document dominant themes and issues contained in court documents. In naturalistic inquiry, memos "are written reminders or explorations of ideas that help researchers make sense out of the data..." (Mellon, p. 81). In this case, this approach consisted of identifying ideas and statements as they emerged in defendant and witness testimony and closing arguments by the defense and the State. The primary concepts which developed from this analysis are synthesized in the following "Infosex in Court" section of this discussion.

In conjunction with this analysis, legal literature as reported in Legal Resource Index (LegalTrac) produced by Information Access Company was searched using the subject terms Miller v. California, pornography, obscenity, broadcasting, and cable television in various combinations. Pertinent documents produced by this search were then analyzed in relation to the major themes which emerged from the Johnson and Rees court records. Findings and conclusions are presented in the discussion which follows.

Infosex In Court

The Offending Incident and Indictments

As mentioned, during the week of August 22, 1993 as part of their 12 a.m. to 2 a.m. program, the producer and host aired a three minute segment of GMHC's erotized, safer-sex tape section "Midnight Snack" which showed men participating in same-gender

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sexual behaviors. Both the Johnson and Rees indictments centered solely on the three-minute videotape; and contended that both defendants knew that the character and content of the tape held certain materials considered under the laws of Texas to be obscene. Specifically the indictment indicated that the tape depicted acts between men engaging in fellation, anilingus, finger anal insertion, and mutual masturbation.[5] In its description of the tape's content, the indictment did not describe standard safer-sex methods used in the film.[6] The indictments further stated that both Johnson and Rees--knowing that the tape contained obscene material--did nevertheless produce, present, and direct such performance. Based on the content of the tape, the County Attorney's Office felt that the televising of the tape warranted presentation to the Grand Jury for possible criminal violations.

The Court Debate

Statements from the Defendants

Rees, testifying in his own defense, stated that he, as an HIV-positive gay man, had made an effort to learn as much as possible about HIV and AIDS after he tested HIV-positive in the early 1990s. Although he had first attended workshops on safer-sex methods at age eighteen, he had not consistently practiced safer-sex methods, which he knew led to his infection. His own infection and the infection of a male partner, who later died of complication from AIDS, motivated him to become the host of Infosex. He felt that the safer-sex message would have more impact coming from

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someone who was HIV-infected. Infosex, as he envisioned it, was not directed at children, but was designed for people who were sexually active, and those who were interested in the program's content--which might possibly include adolescents.

On cross-examination, John Lastovica, Assistant County Attorney challenged Rees as to why his own sexual behavior had not changed even though he had received safer-sex education since the age of 18; and why he did not expect children to be watching his show when he had evidence that they did. He also asked Rees to explain why his showing of "Midnight Snack" was not a calculated move on his part to challenge ACTV's (Austin Cable Television) policy and Austin's values. He also asked Rees to explain why he felt it was necessary to use graphic, erotized information; and implied that other leading HIV-AIDS educational agencies such as the AIDS Foundation of San Francisco apparently did not use such graphic presentation in their publications. He also asked Rees whether he had inquired at the public library, the Texas Department of Health Film Library, and the Austin-Travis County Department of Health about the availability of other films to use on his show. Finally he challenged Rees to explain why he did not speak on his program about the dangers of alcohol and drug use associated with unsafe sexual behaviors. On advice of her attorney, Johnson did not testify, but her statements on the topic were recorded in an television interview on local station KTBC-TV. Parts of her interview where entered into court records during final argument and will be addressed later in this discussion.

Final Arguments for the State and the Defense

Opening Final Argument for the State

Lastovica, on behalf of the State, began his final argument by citing Miller v. California which was decided by the Supreme Court in 1973. He stated that although the test for obscenity as given in Miller v. California was liberal, it did draw a line beyond which responsible persons cannot go. Miller v. California established a three prong test for obscenity. To be judged obscene a piece must be totally without artistic, scientific, or political merits; and the State claimed that the defendants' argument which asserted that the Infosex program was within the bounds established by Miller v. California was not valid.

Because Miller v. California involved a mail campaign in which unsolicited advertisement consisting of pictures promoting "four lewd and obscene books" was delivered to people's mailboxes. He further contended that television was just like a mailbox; and that in modern life television had becoming an accepted babysetter, especially for "latchkey kids." Lastovica suggested to the jury that defendants Rees and Johnson knew that kids were watching and were reckless in their disregard for this fact. He based this charge on the fact that Rees had moved his time slot to a later period became he was aware that as early as October, 1992, children were watching his show, which was in an afternoon time slot. This remark was made in reference to his earlier cross-examining of Rees in which Lastovica implied that Rees knew children were watching his show because of the immature nature and character of some of

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the call-in questions which Rees had customarily received during his program.

Lastovica went on to say that both defendants were well aware of the obscene content of the material, noting that they had discussed some of the content before the showing. To bolster this point he quoted Johnson as saying to Rees after viewing the tape, "Hey, isn't it dangerous for somebody to lick somebody's testicles if they have some kind of genital herpes sore"?

Lastovica reminded the jury that the Supreme Court as well as Texas courts have ruled that one cannot use obscenity in self-expression. In signing the contract with ACTV, Johnson as producer violated her warranties with the station by knowingly using obscene material.

With regard to the health information debate, Lastovica noted that none of the health educators who testified advocated using obscene material to teach health; although he admitted that some of these experts testified that they saw some educational value in "Midnight Snack's" content. But then he raised the question as to whether some of these experts were "looking at it from the standpoint of a reasonable person when they say they things they say." He noted that other expert witnesses who testified that the material was offensive had stated that they could get the same points across with the use of other materials.

He likewise reminded the jury that one of the testifying psychologist, Jim Lefan, Ph.D., had stated that children were not emotionally prepared to deal with adult sexually-explicit

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materials. They could not process it, nor were they prepared to understand what materials such as "Midnight Snack" might mean to them. Because of our duty to protect children, he then suggested that expecting children to be in bed by 2:00 a.m. and by presenting warnings of content was not enough. To paraphrase the words of one of his State expert witness, Lastovica suggested that such materials had the possibility of being traumatic to children because sexual activity is often interpreted by children as violent and aggression; and such interpretation could cause psychological problems in later years.

In his closing, Lastovica reminded the jury that the Miller v. California standard required then to represent all the people of Texas--not just the people of Austin or Travis County. In applying the test of community standards as viewed by the average person, he suggested that they, the jury, would find that the material was patently offensive and based on reasonable men's standard, would have no serious value whatsoever. "What it really is [is] junk."

Final Argument for Defendant Johnson by Attorney Kolker

Thomas Kolker, of the law firm of Greenstein and Kolker, Austin, began his defense of Johnson by reminding the jury that our society is based on the free flow of information; and that the law says that all information is available unless it is so sexually explicit that it exceed community standards and that information when taken as a whole lacks serious literary, artistic, political or scientific value. The law says, he stated, that offensive sexual information is not against the law if it has value.

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He reminded the jury that to convict, they must find beyond a reasonable doubt that: 1) the whole two hour program lacked serious scientific value; and 2) that the defendants at the time of its use knew in their heads that it lacked value. He went on to say that the State must also prove beyond a reasonable doubt that the material was utterly without social value for minors; and that this fact was known by the defendants. Community standards of propriety as held by the average person must be set aside when deciding whether the material taken as a whole lacks serious literary, artistic, political, and in this case, scientific value.

As background, Kohler cited a 1934 U.S. Supreme Court case in which the Court had to decide whether the work Ulysses by James Joyce was obscene. In deciding that case the Court set new precedent by saying that the older rule for obscenity--that which held that if material was offensive to children then it was obscene--was not workable. The Court also wrote that the work must be considered as a whole in terms of whether the work's dominant theme had value.

Kohler then reminded the jury that none of the State's witnesses had been allowed to see the entire two hour program and none of the State's witnesses has formed their opinions based on the entire two-hour program. He also stated that none of the witnesses--whether for the State or the defense had said that the material lacked serious scientific value. Kohler reminded the jury that one witness had said that the film had "some value for homosexual and bisexual men, and other witnesses likewise testified

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that it had value." Kohler also stated that the State must prove beyond a reasonable doubt that the material lacked value for all minors, and that testimony from an expert witness had indicated that it did have value for some minors.

Final Argument on Behalf of Defendant Johnson by Attorney Sauer

Larry Sauer, Attorney at Law, began his argument by stating that the law says you must look at the whole program--in this case, Infosex--inferring not just the three-minute segment of "Midnight Snack." Lastovica objected for the State, telling the Court that the State had not objected to the entire program of Infosex being obscene. The Court then addressed the jury telling members that whey were to consider evidence based on the charge given to them by the Court, which they would have with them when they began their deliberations.

Sauer continued with his argument saying that the jury must not be "fooled" by the three-minute clip--they must consider the whole performance. He also reminded the jury that the law says nothing about television. The law mentions performance only; and he asked the jury to consider whether they would be setting in judgement now if this same clip has been shown in other public places, in educational seminars, or in someone's living room. He reinforced his argument by saying that the three-minute clip was not obscene because it was very valuable and had merit; and that an obscene ruling would forbid its showing by health educators in Travis County.

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Sauer also reminded the jury that they had all agreed previously that a written warning concerning materials about to be shown on television, would be satisfactory for them as individuals; and that the Infosex host had given several warnings before the clip was shown, explaining in detail what was to be shown. Viewers, he noted, had sufficient notice to turn off their televisions sets.

Sauer then stated that the State must prove that the material was utterly without redeeming social value for minors. To bolster his argument, he recalled a statement from one of the State's witnesses, Kenneth Heydrick, a science and health coordinator for the Austin Independent School District (AISD). Paraphrasing Heydrick's remarks, Sauer recalled Heydrick as saying that such a clip would not fall within the AIDS instructional materials policy--"he said basically that he was taking the AISD ride. He had to follow with [what] his people at AISD wanted." Another witness for the defense, William Simon, Ph.D, a professor of sociology at the University of Houston, testified that the clip had value for minors because it taught safer-sex behavior visually.

Sauer next reminded the jury that they must decide if the "exhibition was by a person having a scientific or educational justification." Sauer asserted that the whole program--Infosex presented both scientific and valid information.

He defended the show's content to the jury by reminding them that it first of all "promoted abstinence as the safest, and only

really safe policy." The complete Infosex program was filled with useful and health-directed information about safer-sexual activity--how to use a condom, whether to use an oil-based or water-based lubricant, definition of a dental dam, how to make one; and how to use one. The three-minute clip from "Midnight Snack" was not a gratuitous shot showing orgasm; but rather, it was an appeal to gay men to change unsafe-sex practices.

Sauer suggested that the jury's initial shock at seeing the clip might not have been because of the oral sex act depicted, but because it was a sex act between men--something that "was different for us." But then he asked the jury to recall that the film was not directed at a heterosexual audience, but to gay men. Hypothetically, he asked the jury to consider whether this film would have benefitted them had they had been gay men. Gay witnesses, he recalled, had testified that such a film would have been helpful to them in their younger years.

Sauer then stated that the reason he did not have Johnson testify was because her testimony was previously recorded and was also available in a news clip shown on television. He recalled Johnson's comments as saying that she did not believe it was obscene because it spoke against behavior by gay men which caused them to contract AIDS. She said:

> I was trying to show them how not to get AIDS.
>
> ... We have been talking about AIDS and telling people what to do but we haven't showed them how not to. So I showed then how not to. It's an educational tape. It's

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pretty blunt. It's pretty cold. But it does show you how not to.

Sauer concluded by asking the jury to see that this program had value and to find his client not guilty.

Final Argument on Behalf of Defendant Rees by Attorney Biggers

Cynthia Biggers, Attorney at Law, initiated her defense of Rees by reminding the jury that one of the witnesses for the State, Wynell Nealy, a Texas Department of Health administrator, considered AIDS an epidemic, that the virus is spreading at an alarming rate, that homosexual men are at risk, that men and women who are not gay are at risk, that teenagers are at risk; and that Nealy's department is trying to get that message out to the public. And that "message is that the only way to be 100 percent safe is to abstain from any sexual activity that can cause you to come in contact with bodily fluids. ...But if your going to engage in sexual activity, wear a condom, use safe sex techniques."

Biggers recalled the testimony of a number of witnesses who all said that no one method of information can reach all people. Pamphlets, discussions, billboards, televisions are all necessary if everyone is to be reached. Witnesses also testified that people do not all learn alike.

According to Biggers, some witnesses testified that there is a need for eroticized safer-sex:

> ... to make it more attractive because by doing that you break down people's resistance to using a condom. You help them get over the idea that if they use condom they

won't be able to enjoy sex ... and that it will be acceptable that they would be able to discuss that with their partner and they will be able to integrate it or put it, let it become part of their natural sexual activity and then it will not interfere with your pleasure, that in fact it can be a part of the pleasure.

Biggers also reminded the jury of expert testimony which asserted that the entire InfoSex program of which "Midnight Snack" was an example of an effective safer-sex message. It was effective, according to Biggers because it:

1. Stressed the need to avoid dangerous behavior.
2. Did discuss abstinence.
3. Explained safer-sex techniques for those people who chose not to abstain.

She contended that some expert witnesses, most of whom had not seen the entire two-hour program had believed that the "Midnight Snack" segment had scientific and education value because it presented some of the above information, and they had further testified that the clip could be a part of an effective program designed to educate people about behavior leading to contracting AIDS.

Biggers also recounted witness testimony that stated that at the local level many people where not changing their behaviors and that teenagers were at especially high risk for contacting AIDS. In Travis County, sexual activity begins at fourteen; that Travis County has one of the highest rates of teen pregnancies in the

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country; and the group of people who are getting AIDS at the fastest rate now are young adults, ages 20 to 29.

Biggers also recalled that Nealy had based her remarks on having seen only the three-minute clip--not the entire two-hour program. In her testimony, Nealy had voiced concerns that the tape had no discussion of abstinence; had no information about the need to communicate with a partner; that the tape did not mention problems with oil-based lubricants for condoms and how that might affect the reliability of a condom. Biggers noted that because Nealy had not seen the entire two-hour tape, she was not aware that Rees had mentioned all of her concerns preceding showing of the clip. Nealy herself testified that she felt the clip had educational value and would show it to her staff because of its information content. Other witnesses for the defense had testified that the information given by Rees during the program was correct and that his manner was approachable, respectful, and effective.

Biggers reminded the jury that most of the witnesses did not tell them that they would not show the film to their publics because it lacked value, but because they were afraid of how showing the film might affect their agencies' funding.

With regard to the film-clip's affect on minors, she mentioned that witnesses did not feel the film-clip "was utterly without redeeming social value for minors." Although a State child-psychologist witness stated that he was appalled by the clip and that the content would confuse children, he did not say that it would harm a child, and that years or even days later any

depression, upset, or inappropriate sexual behavior could be associated directly with a minors having seen the clip.

The defense witness, William Simon, Ph.D., testified that the clip alone would not be likely to traumatize a minor who viewed it. Simon stated that a child views such content from a child's perspective, not from that of an adult. Biggers noted too that the State's 13-year-old witness, Brook Newlin, who saw the clip as it was actually shown on the Infosex program presented no testimony about any traumatizing effects which the film had on him.

Biggers then went on to summarize the precautions taken by Rees to avoid showing the film to minors. He was serious in his planning of the program; he chose a late-night spot; he displayed warnings; he presented the information based on the interest of adults, not children; he provided full and accurate information on how not to become infected and the importance of taking responsibility for your own actions; and he placed the clip at the end of his program.

Biggers noted that it was reasonable for Rees to assume that most children would be asleep at the time of the program because it was the night before school started; and that parents would take responsible actions to see that children were not viewing television at that late hour. She noted that the local cable system did offer a $1.80 a-month blocking-device which could prevent unwanted channel signals from reaching into the home.

She further noted that the very viewing of television content available to minors today--"Bevis and Butthead," MTV, "The

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Simpsons," movies on HBO and Cinemax, sex scenes on soap operas--required parental involvement and discussion with children. Biggers then suggested that a discussion of the tape's content with Brook's mother might have been useful and appropriate in explaining to the teenager why the information was presented on the program.

In summary, she reminded the jury that to find her client guilt they must find that the material was "utterly without value, social, educational value for minors." They must also find that this material lacked "serious value beyond a reasonable doubt." She continued in her argument:

> So if there is a difference of opinion among the experts, even if there is a difference of opinion among yourselves, then the State has not proved that it lacks value beyond a reasonable doubt.

Not only that, but to find her client guilty, the jury must find that Rees himself:

> ... Believed that the material was utterly without redeeming social value, had no serious political and scientific and educational value, and believed it was obscene, and that knowing that he put it on the air.

Closing Final Argument on Behalf of the State

In rebuttal, Lastovica asserted that Rees knew very well that this material was obscene and had used the clip to see how far he could take obscenity on access television in Austin, Texas. As evidence, he stated that if Rees did not know the material to be obscene then he did not know about the controversy in New York

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where "they" tried to play it on public television, and "they" had filed a lawsuit "because they weren't allowed to show it [the film] up there." He was alluding to earlier testimony that indicated that Rees had prior knowledge regarding the controversy surrounding an attempt to show "Midnight Snack" on public access television in New York City.[11]

Lastovica then attacked the credibility of one of the defense witness, Simon. He said of Simon:

> Dr. Simon was a kook. He's a nice guy, but he was a kook. He spent his life studying sex. He lives in an ivory tower. His views are not real, and his views are not reasonable.

He then contrasted Simon's credential's with that of the State's witness, Maureen Adair, M.D,. Director of Child Psychiatry, Children's Hospital of Austin at Brackenridge. He recalled for the jury Adair's testimony which stated that "even showing material like that to minors potentially, potentially can be abusive toward those children."

Lastovica next turned his attention to the question of freedom and democracy and free speech in this country and in Austin, Texas and the transmission of information through the information superhighway. He strongly asserted that affirmation of the defense's position, would turn living rooms into x-rated theaters; and that the language of the indictments were specific in terms of the obscene nature of the film's content. Although community access television will have a major role to play in bringing

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information to people in their homes, it will serve no good, if "this is the type of garbage that is played on access television."

Lastovica reminded the jury that Heydrick, a State expert witness, testified that the material had no value and backed up his testimony with recent information gathered from local school-sponsored task-force meetings and town-hall meetings regarding local sex education curriculum design. Public reactions from these meetings indicated that the local community did not want explicit sex information delivered to school children.

In considering erotized, safer-sex information he recalled the testimony of Sherry Bell, Assistant Director for Health Education, University of Texas at Austin Student Health Center and a subpoenaed witness for the State. Bell explained that she had no hard numbers to indicate that erotized, safer-sex information changed the behavior of gay men. He also asked the jury to recall that another State witness, Nealy, had testified that she personally found the content offensive, and did not believe that erotized information was effective because it might encourage viewers to imitate the behavior incorrectly and it might even promote HIV. She felt that eroticizing safer-sex had no serious value and would not give people accurate information on how AIDS is spread.

Lastovica went on to review a number of reasons why the experts who testified would not use "Midnight Snack" in their professional work, including these views: appalling; much too controversial; might lose funding; might lose my grant money; don't

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want to upset people; they would find it offensive, people would complain.

Lastovica reiterated the fact that people did complain. Paul Congo, an ACTV executive official, received a number of calls after the show complaining about the content. Lastovica contended that these complains were proof enough that the film-clip ... "offends - the sensibilities of the average adult."

Lastovica stated that democracy and personal freedom carried with it responsibilities which required correct and careful exercise of personal rights to freedom of speech. Because such films may be shown in New York, he affirmed that did not mean that it could be shown in Austin, Texas because the people of Texas "say you can't, Mr. Rees." Living rooms need not be turned into pornographic movie theaters via cable television.

Lastovica noted that viewers were victims of such programming and he asserted that viewers need not have to assume responsibilities for seeing that the integrity of their homes were preserved by turning off their televisions sets and/or buying blocking devices. "The blame does not go on the victims, the people who don't want this broadcast into their homes. It goes on the people that chose to violate the law."

As part of his argument, Lastovica showed the film No Greater Love, and asked the jury to compare it with "Midnight Snack." His opinion was that "Midnight Snack" contained scenes "which are shameful which vulgarize our sexuality, which degrade it and depict it as less than what it is--a beautiful act." Lastovica contended

that No Greater Love, on the other hand, [celebrated] the intimacy of love and affection and personal contact between two people who care deeply for each other...."

Lastovica concluded his rebuttal to the jury by reminding them that they must represent the citizens of the state--not just citizens in Austin or Travis county. They must find for the average, ordinary person, average people in this state and in this country, and they must speak for them and say to the defendants that what they did wrong and what they did was against the law. This issue, he continued, was not about a 2 a.m time-period, "it is about homes and personal privacy and it is about average citizens and our children."

The Charge of the Court to the Jury

The jury received the charge from the Court on April 8, 1994 at 5:51 p.m. In order to provide a better context for this trial, major portions of this charge are summarized below:

Definition of Obscenity

The Court's Charge to the Jury cautioned the jury that a person commits an offense of obscenity if he knowing promotes or possesses with intent to promote any obscene materials and obscene devices; produces, presents, or directs an obscene performance or participates in a portion of a presentation that is obscene or that contributes to its obscenity.

Obscene was defined by the Court as materials or a performance that to the average person, applying contemporary community

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standards, and taken as a whole appeals to the prurient interest in sex. Taken as a whole such materials must lack serious literary, artistic, political, and scientific value.

"Prurient interests" was described by the Court as:

> shameful, morbid, lascivious, or unhealthy interest in nudity, sex or excretion and goes substantially beyond customary limits of candor in description or representation of the sexual conduct. It is marked by restless craving and is easily susceptible to lascivious thoughts or desires.

Conscious Acts and Objectives

The Court also directed the jury to consider that a person acts intentionally when his conscious objective or desire is to engage in the conduct or cause a result of obscenity; and a person acts knowingly when he has reasonable knowledge that the circumstance of his conduct may well produce obscene results.

Personal and Subjective Judgement

In arriving at their verdict, the Court directed the jury that they "must avoid subjective personal opinion and act as a private adult person applying the collective view of the adult community as a whole." In doing so they must be aware of whether their own opinions are more rigid or liberal than prevailing community standards and be able to defer those to prevailing contemporary community standards.

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Contemporary Community Standards for Texas

As defined by the Court, contemporary community standards included the "entire State of Texas." To arrive at a definition of community standards for Texas, jury members were instructed to rely on their own knowledge of the views and sense of the average person in Texas regarding sex and sexual matters. The were advised that they could consider a wide array of information at arriving at their definition--trial evidence, their personal reading and observation, school and business associations, their travel in Texas, and their having lived in other communities in Texas. They were directed to consider the average conscience in the community to be the critical community marker in the compromise between candor and shame. The Court stated that they could not consider the immediate local community--Austin or Travis County--as the criterion for their definition of community standards.

The Final Test of Obscenity

In arriving as their decision as to whether the material was obscene the Court noted that the jury must find beyond a reasonable doubt that all of the following conditions had been violated: 1. The material affronted contemporary community standards of decency to the point of being patently offensive to the average persons in the community [of Texas]; 2. The material appealed to prurient interest in sex; and 3. Whether or not a reasonable person would find that the material lacked serious literary, artistic, political and scientific value.

The Court then directed that if the material was found to be obscene after applying the above test, then the jury must consider whether the defendants knew that the character and content of the videotape was obscene and "then and there did produce, present and direct the performance."

The Court reminded the jury that the defendants were innocent until found guilty after impartial consideration of the evidence. The State, the Court noted, had responsibility of proving beyond a reasonable doubt the guilt of the defendants and the jury could only consider evidence heard from the witness stand. The jury alone had to decide on the credibility of the witnesses and the weight to be given to their testimony; and the jury was bound by the law as given to it by the Court in its written charge.[11]

A Point of Advise on the Charge

During deliberation, a note was sent to presiding Judge, Brenda Kennedy asking her whether the jury was directed to consider the two-hour Infosex tape as a whole or were they were allowed to consider only the clip. Judge Kennedy responded by saying:

> Everything you can consider is contained in the Court's charge(s). You must read it thoroughly and in its entirety. I can comment no further.[12]

A review of the Court's charge shows that the two-hour program was not mentioned at all; and that the Court's charge centered around allegations made in the indictment, which considered only the character and content of the clip.

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Appeal of the Convictions

Within 30 days of their sentencing, which included one year of probation and a $2000 fine--probated to 200 hours of community service[11]--both Johnson and Rees filed notice that they would appeal their convictions to the Third Texas Count of Appeal.[12] The case will probably be heard by the Texas Third Court of Appeals in the Spring of 1995 (Texas Third Court of Appeal, 1994).

Johnson's and Rees Reasons for Appeal

In their appeal Johnson and Rees asked of the Court:

> Can the State regulate the content of AIDS education through obscenity prosecution? More specifically, can the State prohibit its citizens from using as a part of serious discussion of AIDS and safe-sex, a videotape showing real human being engaging in risk-reducing sexual acts.[13]

Johnson and Rees further claimed that the State in bringing criminal charges against them violated their constitutional rights under both the United States and the Texas Constitution; and they also claimed that the State's prosecution was based on a fundamental misconception of the obscenity law; presented insufficient evidence; and influenced an erroneous charge to the jury.[14] They indicated that because jury verdicts concerning obscenity pose threats of punishment for unpopular expression, appeal "courts have a coextensive and independent duty to determine whether the speech at issue is protected by the U.S. Constitution,

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or whether it is subject to legal censorship."[1]

Specifically, the appellants asked the Court to consider the whole Infosex program--not just the "Midnight Snack" tape in reaching its decision. They claimed that:

> Isolating the short video from the rest of the program allowed the State to pretend it was not prosecuting AIDS education, but merely a porno film. By limiting its case, the State led itself, the jury, and the trial court into errors.

Their appeal brief spelled out in detail the following errors:

> **Error 1.** The state introduced no evidence that the InfoSex program, viewed as a whole lacked serious value based on testimony. Most of the State's witnesses had not been allowed to view the entire program, thus their testimony was in a vacuum, and deprived them of information needed to put the tape into proper context.
>
> **Error 2.** The state failed to prove that the InfoSex was obscene because of its scientific approach to safe-sex techniques. The value of the tape lay in its depiction of actual safer-sex techniques and it showed safer-sex techniques in the context of the needs of a specifically at-risk group of persons. The brief drew upon trial testimony to show how safer-sex technique films differed from commercially available homosexual pornography.
>
> **Error 3.** For various reasons including the mandate to find guilty beyond a reasonable doubt and the lack of

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existence of either direct or indirect evidence, the State failed to prove that Johnson and Rees knew that the InfoSex program was obscene.

Error 4. The charge to the jury was improper in that it failed to instruct the jury to consider the entire InfoSex program; and the jury itself was confused about its charge as evidenced by a note from the jury asking the judge for guidance on this point.

Error 5. The charge to the jury was improper because it failed to instruct the jury that it must find the program lacked serious educational value before it could find it obscene. This failure violated their constitutional rights because it unnecessarily raised the level of proving value.

Error 6. The jury charge improperly defined "prurient interest." The brief claimed that a proper charge essentially must make a distinction between "prurient" interest and healthy interests.

The State Responds

On November 16, 1994 the State filed its own brief in response to the appellants' charges. Although the State answered all of the appellants's arguments in some detail, it basically asserted that: 1) the State was entitled to allege and prove that "Midnight Snack" was the material to be taken as a whole; 2) "Midnight Snack" lacked serious political and scientific value and does appeal to prurient interest; 3) a reasonable person, even if in the minority

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in the community, would find that "Midnight Snack" lacked serious political and scientific value when considered as a whole; it did not have content that lent itself to thought or contemplation; and 4) expert affirmation evidence that the material was obscene was not required. In addition, the brief rejected the appellants' claims that the value test required that the jury to be instructed on the educational value of the tape for high-risk groups subject to HIV infection.

The State also asserted that the tape could not be related to any political or scientific discipline; but instead described it as a vivid and realistic showing and promotion of sexual techniques which encouraged behaviors that enhance risk of exposure to sexually transmitted diseases. In fact, the State stated, its information threatened safer-sex practices. In addition, the State asserts that the average person would agree that the clip appealed to prurient interests in sex and had nothing to do with disease or its prevention. The brief also reminded the Court that according to other court rulings the average person need not be the average person of the intended target audience. Supported by expert defense testimony, the brief further claimed that in terms of safer-sex practices, much of the film's content regarding safer-sex techniques were erroneous and even dangerous.

The State further challenged the appellants in their claim that they did not know the clip's content was obscene. In support of this, the State noted: that the appellants had previewed the film and had discussed possible reactions to it prior to showing;

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Rees knew that a restraining order was in effect in New York City preventing its showing on cable television there; and Johnson in her testimony before the grand jury had said that it was cold and blunt, that it was not suitable for minors, and that persons outside the homosexual community would find it offensive.

In addition, the state claimed that the appellants knew that the content violated the obscenity laws and they knew of its prurient appeal because they took precautions to warn the audience of its content. The State reasoned that the appellants knew the content was obscene because Rees was so concerned about how his audience would accept male nudity and explicit sexual content that on several occasions prior to the showing of "Midnight Snack" he presented his own clip called "Shower Scene." In the shower clip, "Rees was featured nude behind a mottled glass shower door, fondling his testicles and penis and expressing a belief that he is about to ejaculate." The State claimed that because Rees asked his callers if the shower scene had offended them that such concern was proof enough that the sexual conduct shown on "Midnight Snack," which was so much more explicit than that shown in the shower scene, was patently offensive under contemporary community standards.

The State's brief also addressed questions about other trial court errors. The state claimed that the law did not require the trial judge to define "taken as a whole" and that the appellants's defense continually made misstatements when they referred to the entire "Infosex" program as the material being judged. In

addition, the State rejected the appellants' assertions that before "Infosex" could be found obscene, the trial court should have directed the jury to first find whether it lacked serious educational value; and that the statutory language used in the trial court's charge was sufficient, and the trial court was correct in refusing to instruct the jury as to educational value. The State then argued that an "educational value claim" was not required in Miller and that such a claim would in effect exempt virtually all material from an obscene finding because such material as "in Midnight Snack" would be new material to most viewers, implying that to most, the material would be informative.

The State likewise claimed that the appellant's charge that their constitutional rights had been violated under both the U.S. and Texas constitutions could not be sustained because they did not present separate federal and state constitutional claims with substantive analysis or argument.

A Theory About the Actions in the County Court

The Actions of the Court. Although this trial is unique in that it involved HIV-AIDS informational products produced using erotized principles of design, it is not unusual in that it obligated a lower court to face questions of obscenity. Actions of the defense and the State are predictable in that they presented their arguments and facts in line with established legal procedures and precedents. But more importantly, because the judicial history of how to legally determine the serious value of literary,

political, and scientific materials alleged to be obscene is fought with difficulty even up to and including the Supreme Court, this county court followed a very conservative and restrictive approach to determining obscenity. In doing so, it invariably invited appeal by the defendants to a higher court. In the long term, such an approach is probably beneficial to the overall cause of the free flow of health information simply because rulings by higher courts carry greater authority in the setting of legal precedents. Because of the differing views which was apparent in this trial relating to value, purpose, reasonable persons, community standards and a host of other questions, such an approach by the Court is warranted.

The Motives of Johnson and Rees. Because of legal consideration, a theory explaining the rationale and motivation of Johnson and Rees' use of "Midnight Snack" is not easy to develop at this stage of investigation. Their testimony and the defenses made for them by their attorneys would indicate that they showed "Midnight Snack" solely to provide health information. The State, nevertheless, has implied that they showed the clip as a way to challenge local values and traditions. Relying upon a concept developed by Nelson (1994), can be suggested that their act, although perhaps not done consciously, was one of "radical cultural resistance" directed at redefining the boundaries of sexual information?

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The Conviction's Impact on HIV Information

The following discussion will consider this conviction in terms of how the conviction might impact HIV-AIDS health information delivery as well as how the law might have influenced the behaviors of both the county court, the prosecution, and the two defendants . Although attention will be given to court rulings and precedents, such mentions are made not to interpret the law, but to establish reference points to themes and issues which emerged from the Johnson and Rees court records and to relate these to major court interpretations and court-centered commentary which have had and will continue to have influence regarding access to information.

The Serious Value of Safer-Sex Information

A modern axiom arising in post-industrial society is "information is power." This statement implies that without proper information, people do not know their options and cannot make rational decisions regarding their lives. We then can ask, is information about how to prevent contracting the HIV virus as presented in "Midnight Snack," of serious value from a scientific and good health-maintenance prospective? If so, to whom is it of serious value? Defense attorneys Biggers and Sauer held that it was not only of special value to a population of gay men, who are especially at-risk for contracting the HIV virus; but it was also of value to a broad-based group of people because it presented

techniques on sexual behavior designed to reduce dangerous behaviors known to promote the contracting of HIV.

Theoretical literature supports such views asserting that the best preventive approach is to present such information in the language and value system of the immediate culture and society. In the case of gay male society, this precludes using behavioral standards set by hetrosexualism because such values basically discount the validity of gay sexual behavior (Patton, 1992).

The Supreme Court in considering value in terms of obscenity, referred to Miller:

> The First Amendment protects works, which, taken as a whole, have serious literary, artistic, political or scientific value, regardless of whether the government or a majority of the people approve of the ideas that these works represent. Just as the ideas a work represents need not obtain majority approval to merit protection, neither, insofar as at the First Amendment is concerned, does the value of the work vary from community to community based on the degree of local acceptance it has won. The question is not whether an ordinary member of any given community would find
> serious literary, artistic, political or scientific value in allegedly obscene material, but whether a reasonable person could find such value in the material taken as a whole (Smith, 1988).

A footnote to the above passage explains that a work may have serious merit even if a majority of the community would not agree (Smith, 1988, p. 136). Because a work can be found obscene and not given First Amendment protection even if it has moderate value, the true test is that taken as a whole it must have serious value (Beatty, 1991).

Of interest in the Johnson and Rees case, are findings by the Eleventh Court of Appeals in Luke Records which said that to determine serious value, additional evidence outside the item itself must be introduced (Waddoups, 1993). In requiring additional evidence, this court challenged the Supreme Court precedent that the work itself is sufficient evidence to determine serious value (Waddoups, 1993); but because of its departure from Supreme Court precedent, this ruling may not have wide application beyond Luke Records.

The question of serious value is further complicated when the role of government is taken into account regarding its interests in the promotion of proper social behaviors. In Miller, the underlying principles seem to be that decisions about obscenity "calls for judgment based upon what is good for society--in other word, a moral judgment" (Brockwell. 1993, p. 138).

In today's climate which presents evidence of limiting homosexual conduct through court decisions, laws, and voter initiatives, will or in consideration of social disapproval, can any information which uses homoerotic imagery be defended as moral? This moral question becomes even more relevant in states such as

Texas which have sodomy laws which criminalize homosexual sexual behaviors and which are sometimes used by extension to exclude homosexuals from participation in public life. Although the Texas sodomy law (section 21.06 of the Texas Penal Code) was declared unconstitutional by the Third Court of Appeal and dismissed on a technicality in Texas v. Morales by the Texas Supreme Court, it is still used as justification for excluding gays and lesbians of certain rights such as patenting, formal group association, and jobs ("Gay Student Group ...," 1994).

Taken as a whole, does "Midnight Snack" have serious value and can it be defended morally? To answer these questions, we must consider the context in which "Midnight Snack" was developed and produced.

According to an explanation by a GMHC spokesperson, this clip was produced as one more means of providing effective, safer-sex information to gay males (Payne, 1994). The rationale offered by GMHC is that all sorts of message designs and dissemination channels must be used if safer-sex behavior information is to reach the entire gay male population (Payne, 1994, and Gay Men's Health Crisis; 1994) This rationale supports the theory that before destructive sexual behaviors can be changed they must be internalized so that the consequences of behavior can be considered and modified by the individual, and that internalization must be in the context of the values and behaviors important to the culture and group ("Erotizing Safe Sex," n.d.). According to GMHC, the erotized tape series was not produced to stand alone. "Midnight

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Snack" was intended to be integrated into instructional programs which promote sound scientific information about safer-sexual behavior (GMHC, 1994). Such training sessions ideally would be given by experts and include focused groups discussions about personal behavior and support for adaptation of safer-sexual behaviors.

To answer the moral question, GMHC educators might argue that its purpose in producing such tapes was in support of the humanitarian moral ideal of preventing unnecessary death and disease. Although not extending to the client and patients of physicians and other medical personnel, court precedent has held that explicit sexual materials found in medical literature produced for the education of physicians and related personnel which necessarily use graphic illustration and description of human anatomy are not obscene and are exempted from obscenity laws because they do not appeal to the prurient interest of sex.

The "Reasonable Person's" Approach to Value

Who is the "reasonable person"--how is he or she to be determined? In Pope, Justice Stevens, along with Justices Marshall, Brennan, and Blackmun of the Supreme Court raised serious questions in their descent about "the amorphous nature of the 'reasonable person,' and the due process ramifications of promulgating a standard with such potentially subjective and nebulous boundaries" (Paul, 1988, p. 186). Law observer Penny E. Paul wrote in 1988 that the "reasonable man" concept has not only escaped concrete definition, but often it has taken on metaphors

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from the context of the case at hand. In the present case this seems to have been those of the "sensibilities of the average adult [living anywhere in Texas]"

In terms of due process, critics have held that such a definition asserts prescribed behavior with impossibly high standards; and "in obscenity cases ... predisposes the jury against the defendant; use of the Pope definition of the reasonable person may further push a jury in ... [the direction of conviction.] (Paul, 1988, 205). As the Washington Post stated editorially, the Supreme Court in Pope "perpetuated a standard that is probably ... subjective and ... vulnerable to community and majoritarian influence ..." (Paul, 1988, p. 213); and in his dissent in Smith v. United States, Justice Stevens warned against the "potentially capricious dynamics of juries applying ambiguous standards ... revolved around the emotionally volatile issue of pornography ..." (Paul, 1988, p. 195).

Defining Community and Values

In determining the definition of "community," in local obscenity cases, the Supreme Court has allowed a number of geographic areas to be considered "community," including the entire state. A county court in the Johnson and Rees case, determined that the jury was to consider Texas as the community, and cautioned the jury to disregard what might be understood to be prevailing attitudes in the local area. In addition, the Court instructed the jury to consider reasonable persons in the community to represent what they understood to be "the average person, applying

contemporary community standards." Nowhere in the charge does the Court inform the jury that a difference exits between a reasonable person and the average person. Nor does the charge mention that courts and juries may consider that reasonable persons may find materials to have serious value even if this view will be in conflict with views held by the majority in the community (Beatty, 1991).

Edward Main in his review of the concept of "value" as expressed in Miller reasoned that the Supreme Court strongly suggested that questions of value should be addressed by experts who could be expected to recognize literary, artistic, political, or scientific value; and he recalled that in Pope, the Supreme Court held that the value criteria could not be decided by reference to contemporary community standards but rather to whether a reasonable person would find value in such material taken as a whole--and that such value need not be approved by the government or a majority of the people. An earlier observation by the Court in Roth also implied that First Amendment protection could be undermined by the prevailing climate of opinion; and that contemporary community standards and prevailing climate of opinion used synonymously cannot be employed to determine the value of a work (Main, 1987).

Due Notice and First Amendment Rights

Due notice is the principle that laws must be written and enforced in such ways as to communicate to the citizens the letter and intent of the law; and as:

> The [Supreme] Court has recognized that when a legal doctrine is so vague as to be undefinable, ... the doctrine is unconstitutional because citizens are not able to predict what conduct may be illegal (Beatty, 1983, p. 624).

According to testimony of both Johnson and Rees they did not consider the content of the tape to be obscene. They had a serious interest in mind when they decided to show "Midnight Snack" to their audience and that was to promote safer-sex behaviors, thus reducing the spread of the HIV virus. No commercial interests or profits were involved, and according to their testimony the promoting of prurient interest was not a part of their objectives. Nevertheless the State contended that they knew that the sexual behaviors depicted in "Midnight Snack" was obscene.

Does this divergence of views raise the question of Due Notice violation? Because GMHC created this film specifically to help gay men modify dangerous sexual behavior in face of the spread of HIV, and because Johnson and Rees had for several years been presenting safer-sex programs on cable access television in a systematic attempt to help persons within the local community understand and apply safer-sex techniques, is it realistic to believe that Johnson and Rees did not consider "Midnight Snack" to be obscene according to the culture and society of their primary audience--gay and bisexual men? Because of this cultural framework, were they therefore unable to predict that their conduct was illegal? This

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question become even more problematic when the history of obscenity arrests and trials in Austin are considered.

Until the Johnson and Rees conviction, no obscenity convictions had been delivered in Travis County in two decades. Considering such cultural and social background, were Johnson and Rees afforded Due Notice before they made their decision to use "Midnight Snack" on their program? Although the Supreme Court in 1913 in Nash v. United States held that sure knowledge of the law was not necessary for conviction and that vagueness could be cured by authoritative state court interpretations (Rigg, 1981), the Supreme Court has always been "especially intolerant of vague statutes regarding First Amendment issues" (Beatty, p. 642). In Kolender v. Lawson the court noted that:

> [The Constitution] requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement (Beatty, p. 642).

Because the Supreme Court in its review of Stanley v. Georgia wrote that "the Constitution protects the right to receive information and ideas, regardless of their social worth..." (Beatty, 1983, p. 650), the reluctance of witnesses to use "Midnight Snack" in the course of their own sex education and health education programs must be considered. The State, in its rebuttal argument even recited these reasons:

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> ... appalling, much too controversial, might lose funding, might lose my grant money, don't want to upset people, they would find it offensive, people would complain.

All of these reasons--including appalling--appear to be based on political, social, and culture reasons arising from normative heterosexual cultural standards rather than educational and informational principles designed to change dangerous behaviors occurring in a targeted, non-heterosexual population.

Protection of Obscene Materials and Inexpressible Emotions

Other questions which must be faced when considering this convictions under Miller pertain to Supreme Court decisions which have affirmed two First Amendment theories which seem to contradict Miller. One is the right to receive and possess obscene speech, and the other is the right to protection of inexpressible emotions (Beatty, 1983).

Constitutional interpretations by the Supreme Court allow the possession of adjudicated obscene materials in the home; but at the same time limitations are placed on their general accessibility outside of the home and in public places, and in their production, distribution, and sale. In Stanley v. Georgia a Supreme Court majority ruled "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime" (Stewart, 1988, p. 237); and later Justice Stevens in his dissent in Pope noted the conflict between the right provided by the First Amendment for "individuals to privately possess and enjoy obscene

matter and equally protected right to provide information to a willing adult recipient (Stewart, 1988, p. 245). This principle seems important in light of the 1982 Roy City ruling by a federal district court which stated that cable television programs are to be treated just as books and magazines. The Roy City ruling will be discussed in more detail later.

According to Supreme Court decisions, inexpressible emotions are emotive expressions which are not precise, are not intellectual, and do not carry detached explication. This principle arose when Justice Harlan in Cohen v.California asserted that wearing a jacket with the words "Fuck the Draft" into a courthouse corridor was constitutionally protected, rejecting the "'dichotomy between reason and desire that so often constricts the reach of the First Amendment.'" (Beatty, 1991 p. 650). For health reason, might non-normative, sexual expressions practiced within a sexual minority subculture as presented in the film "Midnight Snack" and designed and produced with the goal of helping to saves lives fall within the definition of "inexpressible emotions?" Can and should the law say that this form of expression is so different in emotional form and context from a political and public-policy protest statement that it is in need of suppression? How different and much more worthy of constitutional protection, we might wonder, is wearing a jacket in a public hallway with "Fuck the Draft" written across it than showing a sexually explicit film depicting same-gender, safer-sex behaviors designed to control deadly disease?

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Cable Television, New Technologies, and Audiences

Although juries may decide that materials such as "Midnight Snack" have serious value and are therefore not technically obscene and are consequently entitled to First Amendment protection, can that protection be extended to broadcast over cable television to a generalized audience? According to federal statute obscene material cannot be knowingly distributed by cable or subscription television, but indecent materials do have some protection (Edwards, 1992).

Texas in it prosecution of Johnson and Rees contended that the defendants disregarded the likelihood that children would be in their audience and that portions of the adult audience would not consent to receiving content as presented in "Midnight Snack." The defense in response, noted that special effort was made to air the program at a time near 2 a.m. when children would not likely be in the audience, and to warn the audience beforehand of the nature of the clip. The defense further claimed that parents had responsibility to monitor their children at that early an hour and that technological devices were available to block certain channels from reaching into their homes. Adults, once warned of the content, had the option of not viewing the program. The State contended that this view made victims of youth, parents, and unwilling adults and made them the cause of their own victimization.

However, in Roy City a federal district court in considering indecent materials on cable television held that standards

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developed by the Supreme Court earlier in Pacifica were inapplicable to cable television. The Pacifica standards stated that indecent broadcasts which might be easily heard by children and unwilling adults were not permissible for radio broadcasting. But the court in Roy City outlined how cable television and broadcasting differed, saying that subscription to cable was a private contract, it offered choices, was not pervasive, was subject to cancellation, was fee-based, and was not available everywhere. This court also said that Miller offered a core national standard which allowed for flexibility at a community level and that "books, magazines, cassettes, periodicals, movies, and cable television are all treated essentially in the same fashion" under Miller (Hartglass, 1984, p. 89.)

Alluding to the Supreme Court's findings in Pacifica that "differences exit between radio, television, and ... closed-circuit transmissions," some observers have contended that current screening technology now available, and late night scheduling, can protect children against exposure to indecency in the home environment via cable television (Hartglass, 1984).

To reiterate, although courts have always been sensitive to issues of protecting children in the home from exposure to indecency through television, such limitations have usually extended to situations where no parent(s) can be present to exercise discretion regarding what their children view and/or read, and in situations where parents cannot in a practical sense

exercise appropriate control due to the nature of the communication (Hartglass, 1984, p. 90).

Apparently precautions taken by Johnson and Rees, the responsibility of parents to supervise viewing behaviors of their children, and perhaps the availability to electronic blocking devices were enough to bring an acquittal on the "reckless exposure of minors to sexually explicit materials" charge. Although jury notes indicate that all but one jury member voted for conviction.[11]

Impact of the Conviction on Education and Information Programs

Because "Midnight Snack" was judged obscene by a jury and if the conviction is not overturned by higher courts, then "Midnight Snack" apparently can only be viewed in private homes in Travis County. Its use in public arenas would be curtailed, and even its delivery to a private home could be a criminal offense. Sex educators, HIV-AIDS workers, and health information providers would be placed at risk of prosecution if they presented it publicly through lectures, workshops, or seminars. Legal possession, circulation, and other forms of dissemination of the tape by resource collections such as libraries and community-based HIV-AIDS care and information centers could also be placed in jeopardy.

CONCLUSION

Sex-Positive Messages and Social Acceptance. "Sex-positive" messages such as "Midnight Snack" designed to convey preventative AIDS-HIV information more times than not conflict with political,

social and cultural realities of what is acceptable within society. The trial of Johnson and Rees at a county level demonstrates this.

Erotized, especially homoerotic-based HIV-AIDS preventative information has been subject to both governmental censorship and legal restraint as well as social disapproval. The Johnson and Rees trial has forced a county-level court to consider the nature of homosexual, erotized health information, with the defendants claiming that the information presented was legitimate, life-saving information, and by its serious value, was entitled to First Amendment protection. However, the state of Texas contended that it was worthless obscenity distributed by breach of contract on the part of a producer through a public access cable systems.

Sex, the HIV Disease and the Courts. One problem presented by the Johnson and Rees case is that current opinion may not yet accept the idea that a responsible approach to dealing with HIV-AIDS is not likely to be a conservative approach. HIV-AIDS in the majority of cases is caused by unhealthy sex and/or drug-based behavior and such behavior is often culturally and socially determined. Traditional, broad-based community standards about sex and sexual behavior such as that endorsed by a county court jury in the Johnson and Rees trial could possibly restrict safer-sex information distribution.

Problems for Libraries and Information Centers. The conviction of Johnson and Rees renders the providing of such material in general libraries and information centers problematic. Although HIV-AIDS information can be found in library collections,

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materials similar to "Midnight Snack" are generally found only in special-service libraries such as the AIDS Information Network of Philadelphia, local community-based services centers, and specialized research libraries and collections.

Electronic Information Transmission. A question which this case presents, but which was not dealt with in terms of the county court's instruction to the jury concerns how sexually explicit information can be disseminated over electronic media such as television and newer forms of interactive multimedia transmission systems. The Court's instruction to the jury seem to imply that if the film-clip was not found to be obscene according to community standards based on the "average person" viewpoint, and that it had serious scientific and social value, and that the defendants did not consider it to be obscene and did not intend to provoke obscene behavior on the part of other people, then the material could not be judged obscene under law. Such a ruling, by implication and previous court rulings, suggest that it could be transmitted to appropriate audiences in any format possible, including electronic formats.

Personal Judgement, Social Action, and the Law. Another consideration which must be mentioned here is that of producer judgement. Johnson and Rees imply in their appeal that in their eagerness to provide safer-sex information to the public, they made a critical error in assuming that an instructional tape produced for gay and/or bisexual male audiences would be suitable for community access cable television distribution. They contend that

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bad judgement according to the Texas law of obscenity is not enough to convict.

But deeper personal and social action issues might certainly be involved here as well. For example, Nelson (1994) theorized that the need for more explicit safer-sex information in the face of the HIV-AIDS crisis and within an increasingly conservative political environment has taken on the role of "radical cultural resistance." Were Johnson and Rees more involved in an action of radical social resistance designed to test the limits of Texas' obscenity laws than in providing health information as the county prosecutor has implied?

Information in the Future. As information of all types becomes more easily assessable though electronic transmission and as it becomes more audience specific, the courts in the United States will likely be called upon more frequently to consider problems associated with information provision.

In general, legal literature reflects much uneasiness with court interpretation of obscenity laws. For example, law commentator Donovan Gaede (1994) contended that current Supreme Court interpretations of Roth and Miller are unsound ideologically, perpetuates class and viewpoint discrimination, and promotes discriminatory enforcement by police and prosecutors. He wrote that:

> Until such time as a positive correlation is made between obscenity and ... proscribable social harm, obscenity featuring and distributed to consenting adults, should

enjoy the same First Amendment protection as other socially unpopular expression (Gaede, 1994, p. 451).

It is clear that information providers and health educators must continue to monitor how the law and society adjust to the many views of sexual conduct, health, and information access. The current volatile political and social climate of the country, coupled with the nebulous obscenity laws and court interpretations of them in light of constitutional rights make this a difficult task.

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NOTES

1. Texas v. Johnson and Texas v. Rees (147 Jud. Dist. Ct. of Travis County, Grand Jury, July Term, 1993). Indictment of Promotion of Obscenity--Misdemeanor A. (Indictment nos. 934206 and 934208). See also Indictment, Rees Trial Record at 5, App. 1, (Cause no. 400,780), and Indictment, Johnson Trial Record at 5, App. 3, (Cause no. 400,781); and Indictment, Consolidated Brief, App. 1. Hereafter cited as Indictment.

2. Texas v. Rees and Texas v. Johnson, Verdict of the Jury, Rees Court Record at 146; and Johnson Court Record at 116.

3. Rees v. Texas and Johnson v. Texas (3d. Dist Ct. App. (Nos. 3-94-290-Cr and 3-94-291-Cr). Consolidated Brief of Appellants, (filed September 21, 1994). Hereafter cited as Consolidated Brief.

4. This remark is attributed to Jack Champers--a conservative, religious cable access program host in Austin.

5. Indictment.

6. Id.

7. Rees v. Texas and Johnson v. Texas, Statement of Facts, vol. VII at 18-96. Hereafter cited as SOF. (Note: SOF transferred from Travis County Clerk to Clerk, Texas 3d. Ct. of Appeal and numbered 3-94-290-Cr and 3-94-291-CR).

8. SOF vol. VII at 133-49.

9. Id. at 150-62.

10. Id. at 163-74.

11. Id. 75-6.

12. Id. at 189-99.

13. Texas v. Rees and Texas v. Johnson, Charge of the Court, Rees Trial Record at 134-43, App 2 and Johnson Trial Record at 104-13. App. 4. See also Consolidated Brief at 134-43. Hereafter cited as Charge.

14. Texas v. Rees and Texas v. Johnson, Questions from the Jury, Rees Court Record at 129; and Johnson Court Record at 98. See also Consolidated Brief at 31. Hereafter cited as Questions.

15. Texas v. Rees and Texas v. Johnson, Order Granting Misdemeanor Probation Trial (Jury)--Any Plea Punishment (Court). See also Rees Court Record at 147-48; and Johnson Court Record at 117-18.

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16. **Consolidated Brief at 143.**

17. Id. at 4.

18. Id. at 4-5.

19. Id. at 8-9.

20. Id. at 14, citing SOF, vol. VI at 57.

21. Id. at 33, citing SOF vol. VII at 122-23.

22. Rees v. Texas and Johnson v. Texas (3d. Dist. Ct. App.) (Nos. 3-94-290-Cr and 2-94-291-Cr. State's Brief, (filed November 16, 1994). Hereafter cited as State's Brief.

23. Id. at 26.

24. Id. at 27.

25. Id. at 36.

26. Id. at 22, citing 413 U.S. at 26, 93 S. Ct. at 2616.

27. SOF, vol. VII at 193; and Charge.

28. Charge.

29. SOF, vol. VII at 193.

30. The Pacifica ruling arose when an afternoon broadcast by a New York radio station aired satirist George Carlin's Filthy Words" monologue. This broadcast was heard by a member of the "Morality in Media" organization and his young son. The father complained to the FCC. The U.S. Supreme Court ruled that the broadcast was "indecent" within the meaning of 1464 of the U.S.C. (1976); and that the term "indecent" was not restricted to obscene only. See Pacifica, 438 U.S. at 729-30 and Federal Communications Commission Reports, 56 F.C.C. 2nd. 94-95 (1975).

31. Questions.

32. Consolidated Brief at 4.

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